

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FREDERICK A. SIEGERT,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
DCO7528810170

DATE: NOV 9 1988

Frederick A. Siegert, Galesville, Maryland, pro se.

Major David M. Crane, Bremerhaven, West Germany, for
the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued April 26, 1988, that sustained his removal. The Board GRANTS the petition, 5 U.S.C. § 7701(e). The initial decision is VACATED and the case is REMANDED to the regional office for adjudication.

BACKGROUND

The agency removed the appellant from the position of Clinical Psychologist, GS-12, for failure to maintain clinical privileges which are a requirement of his position. Department of the Army regulations require that psychologists be credentialed by the agency's Credentials Committee before being allowed to practice at the agency's Medical Treatment Facility or to initiate or alter a regimen of medical care. See Appeal File, Tab 7, Subtab 8 (AR 40-66).

The administrative judge sustained the agency action. The administrative judge found that the Board has no authority to review the reasons underlying the revocation of the appellant's clinical privileges. He then sustained the charge, based on the appellant's stipulation that his clinical privileges have been revoked after a hearing by the 7th MEDCOM Hearing Committee and a final decision by the Surgeon General and that these privileges are a requirement of the position he encumbered.

The administrative judge found further that the appellant failed to show harm in the agency's failure to consider his written response to the removal proposal because the appellant's written response was an attack on his revocation of clinical privileges and the deciding official had no authority to overturn that revocation.

In his petition for review, the appellant argues that the administrative judge erred in finding that the Board has no jurisdiction to review the determination of the Credentials Hearing Committee because the questions before the Committee were basically performance issues of the type which the Board reviews regularly and that the agency's method of removing him was a cover-up for their reprisal against him for getting his credentials approved previously.¹

ANALYSIS

The Board has broad jurisdiction under Title 5 U.S.C. Chapter 75 to review agency actions removing employees and to examine the reasons on which those actions are based. We hold that the administrative judge erred in finding that the Board lacks jurisdiction to review the action of the Credentials Hearing Committee. The cases, relied on by the administrative judge, in which the Board and the courts have

¹The appellant also argues that the agency's failure to consider his written response to the notice of proposed removal was harmful error per se. The administrative judge, however, properly found that, in order to constitute reversible error, statutory error must be shown to be harmful. See *Handy v. United States Postal Service*, 754 F.2d 335, 337-38 (Fed. Cir. 1985). The administrative judge also properly found that the appellant failed to show harm because the deciding official was without authority to consider the substance of the appellant's written response, a challenge to the merits of the agency's revocation of his clinical privileges. In any event, the appellant will have an opportunity on remand to challenge the merits of the revocation of his clinical privileges.

recognized that in certain circumstances restraint in the exercise of this jurisdiction is appropriate are inapposite.

Cases involving security clearance determinations are inapplicable to the appellant's situation. In *Department of the Navy v. Egan*, 108 S.Ct. 818 (1988), the Court accepted the general proposition of administrative law that the absence of any statutory provision precluding appellate review creates a strong presumption in favor of appellate review. The Court, however, found that this proposition "runs aground when it encounters concerns of national security," *id.* at 823, and found that the Board lacked jurisdiction to review security clearance determinations.

The Court reasoned that denial of security clearance is the province of the Executive Branch and, rather than being a disciplinary action for past performance, is an attempt to predict a person's possible future behavior and to assess whether, under the compulsion of circumstances or for other reasons, he might compromise sensitive information. The Court held that predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information.

The Court stated further that a security clearance denial may be based upon concerns completely unrelated to conduct and concluded that it is not reasonably possible for

an outside nonexpert body to review the substance of such a judgment. The Court emphasized that security clearance normally will be granted only if it is "clearly consistent with the interests of the national security," while the Board reviews adverse actions under the preponderance of the evidence standard. The Court opined that these two standards seem inconsistent. Thus, it held that denial of security clearance is not an adverse action in itself and that the Board has no jurisdiction to review it when it is the underlying reason for the adverse action. *Id.* at 825-27.

In *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986), the Board held that its jurisdictional decision in *Egan v. Department of the Navy*, 28 M.S.P.R. 509 (1985), *rev'd*, 802 F.2d 1563 (Fed. Cir. 1986), *rev'd*, 108 S.Ct. 818 (1988), which was subsequently upheld by the Supreme Court, did not extend to cases involving medical certification. The Board held that *Egan* addresses only those adverse actions which are based substantially on an agency's revocation or denial of an employee's security clearance. The Board held further that the considerations underlying the decision not to review security clearance determinations "are clearly not present in cases involving medical certification" and that the Board may fully review the validity of an agency medical determination which affects the qualification for a position.

The Board stated:

Although the agency's requirement of medical certification for Air Traffic Control Specialists is properly based upon the laudable concern for the safety of the flying public, such concern must be distinguished from that arising in cases involving national security. Consequently, we can find no reasonable basis for limiting the Board's scope of review when considering the validity of agency medical determinations.

Cosby, 30 M.S.P.R. at 19.

Equally, the appellant's situation is not similar to Egan. A credentialing action does not have the distinguishing features of a security clearance determination. Rather, it is very similar to the types of actions reviewed by the Board under its authority to adjudicate adverse actions and performance-based actions.

Agency regulations provide that clinical privileges are to be developed individually for a number of health care specialties, from physician to speech pathologist. The regulations provide further that as a rule clinical privileges are developed categorically for all practitioners who function in a support role to the physician, but that these practitioners also may be individually credentialed.

Standards for granting clinical privileges are developed by each clinical department or discipline. Further, individual clinical privileges may be granted and revoked biennially based on appraisals of clinical performance and professional conduct. Actions to deny clinical privileges are to be taken when a practitioner is found to be providing substandard care and when a practitioner's conduct requires action to protect the health or safety of patients, employees or others. Appeal File, Tab 7, Subtab 8. Thus, this determination is very different from a security clearance revocation and *Egan*, 108 S.Ct. 818, is not controlling.

Nor do we find the doctrine of collateral estoppel applicable here. The Board has identified three prerequisites for the application of the doctrine: (1) The issue must be identical to that involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination in the prior action must have been necessary to the resulting judgment. *Payer v. Department of the Army*, 19 M.S.P.R. 534 (1984).

With respect to the identity-of-issues requirement, differences precluding the application of the doctrine may be in facts, subject matter, periods of time, case law, statutes, procedural protections, notions of public interest, or qualifications of tribunals. *Gomez*, *The*

Application of Collateral Estoppel in Proceedings Before the U.S. Merit Systems Protection Board, 39 Labor L.J. 3 (1988). The Supreme Court has held that before a party can invoke the collateral estoppel doctrine, the legal matter raised in the subsequent proceeding must involve the same set of events or documents and the same "bundle of legal principles" that contributed to the rendering of the first judgment. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948).

The Board finds that the doctrine of collateral estoppel cannot be applied in the appellant's situation. Even assuming that the matter raised before the Board involved the same set of events or documents, the credentialing hearing committee was not applying the same "bundle of legal principles" as the Board. The hearing committee procedures allow only that the employee appearing before it has the right to consult counsel. This limited right to counsel changes the scope of the due process rights to present evidence, and to cross examine witnesses because of the limited role that counsel may play.

Further, there is no standard prescribed for the committee's ultimate determination. The Board adjudicates an adverse action brought under Chapter 75 under the preponderance of the evidence standard. 5 C.F.R. § 1201.56(a)(ii). Although the hearing committee is encouraged to document its findings with reference to

specifically identified incidents or situations, Appeal File, Tab 7, Subtab 8 (AR 40-66 § 9-17(d)(7)), the regulations governing the committee do not prescribe that the committee weigh all of the evidence and assess it against a predetermined standard.

Thus, the doctrine of collateral estoppel does not preclude Board review of the Credentials Hearing Committee's action. See also *Williams v. United States Postal Service*, 35 M.S.P.R. 581, 585-588 (1987) (even if the prerequisites for collateral estoppel exist, the reviewing body may refrain from applying the doctrine due to the different nature of one forum as compared to the other, or where there is reason to doubt the quality, extensiveness, or procedural or substantive fairness of the prior adjudication).²

²The cases, relied on by the administrative judge, which have applied the doctrine of collateral estoppel are inapposite because, in each instance, the matter before the court and the Board involved both the same events and an equivalent "bundle of legal principles." In *Graybill v. United States Postal Service*, 782 F.2d 1567 (Fed. Cir. 1986), cert. denied, 107 S.Ct. 462 (1986), the court held that the Full Faith and Credit Clause of the Federal Constitution, as implemented by 28 U.S.C. § 1738, precluded the appellant from introducing in a Board proceeding evidence of his innocence of a crime for which he had been convicted in Maryland. The Maryland adjudication given collateral estoppel effect afforded the appellant full due process protections and decided the criminal action using the reasonable doubt standard. In *McGean v. National Labor Relations Board*, 15 M.S.P.R. 49 (1983), the Board held that the appellant, an attorney, was collaterally estopped

Additionally, the principles that operate to remove military determinations from Board review are not present here. In *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), the Court held that orderly government requires that the judiciary be scrupulous not to interfere with legitimate military matters. The Court explained:

[J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian.

Id.

Thus, the Board does not have jurisdiction to make a collateral inquiry into military selection processes. See *Buriani v. Department of the Air Force*, 777 F.2d 674 (Fed. Cir. 1985) (the Board does not have jurisdiction to review an appellant's failure to be promoted through military processes even though that failure resulted in both the loss

(Footnote continued from previous page.)

from attacking in a Board proceeding the finding of the D.C. Court of Appeals suspending him from the practice of law for a year and a day. The D.C. Bar disciplinary action underlying the court's determination afforded the appellant due process protections at least equal to those of the Board and adjudicated the disciplinary matter using the clear and convincing evidence standard. See Rule XI of the Rules Governing the Bar of the D.C. Court of Appeals.

of the appellant's membership in the Air Force Reserve and separation from the appellant's civilian position); *Zimmerman v. Department of the Army*, 755 F.2d 156, 157 (Fed. Cir. 1985) (the Board does not have the jurisdiction to examine military assignments and transfers).

The rationale of the cases resulting in the finding that the Board lacks jurisdiction to review wholly military determinations is based on the military being a separate system from the civilian, with separate rules, regulations, procedures, and other considerations. This rationale is inapplicable in the appellant's case because determining the clinical privileges of civilians is not a wholly military matter. Further, the appellant was not subjected to the review of a military tribunal.

Finally, the Board finds that the administrative judge improperly relied on *Woodby v. Department of Justice*, 11 M.S.P.R. 593, 596 (1982). In *Woodby*, the Board held that an administrative judge, in adjudicating the appeal of an employee removed for failing to pass a standardized examination and thereby failing a basic training course, has no jurisdiction to determine the validity of a specific test question because the entity that standardized the test was not a party to the appeal and the grading standards were the same for all employees.

The Board finds that the situation in *Woodby* is not comparable to the instant case because the elements of constancy in *Woodby* are absent from this case. In *Woodby*, the agency uniformly prepared a class of employees to take a standardized examination, then gave the same examination to each member, considering the validated answers to all of the test questions as the correct answers. In this case, the composition of the hearing committees varied and the standards of the credentialing committee, which are applied by the hearing committee, are subject to individual interpretation. Further, without a standard for arriving at its decision, the Board cannot be assured that the "grading standard" was the same for each hearing committee decision. Finally, the subject matter of each hearing varied widely depending on the facts of the individual cases before the hearing committees.

Thus, after considering its cases limiting review of the decisions of other bodies and the reasons for these limitations, the Board finds no precedent dictating or even suggesting that the action of a Credentials Hearing Committee is beyond review.

Further, an agency cannot through its own action confer or take away Board jurisdiction. *Stivers v. United States Postal Service*, 9 M.S.P.R. 346, 347 (1981); *Rosenbach v. Department of the Navy*, 9 M.S.P.R. 37, 38 (1981). The

appellant, an employee as defined at 5 U.S.C. § 7511, was removed, a covered action under 5 U.S.C. § 7512, and therefore has a right of appeal to the Board under 5 U.S.C. § 7701. The Board finds that the action of the agency credentialing committee limits neither that appeal right nor the issues that may be adjudicated.

Indeed, in *McLaughlin v. Department of the Army*, 34 M.S.P.R. 334, 341 (1987), the Board considered the findings of a Credentials Hearing Committee in an appeal of a performance-based removal action. In that case, a Credentials Hearing Committee was convened, but did not revoke the appellant's clinical privileges as a dentist and subsequently, the appellant was removed for poor performance. *McLaughlin* shows that the credentials hearing committee may not be the ultimate decisionmaker on removal; rather, an employee whose credentials are maintained may nonetheless be subjected to an adverse or performance-based action based on the same charges that would be brought before a Credentials Hearing Committee.

Thus, the Board has jurisdiction to review the actions of a Credentials Hearing Committee.

Accordingly, the Board vacates the initial decision and remands the case to the regional office for further

proceedings consistent with this Opinion and Order, including an adjudication of the appellant's claim of reprisal.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board